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In the Supreme Court of the United States

OCTOBER TERM, 1982

CHILDREN OF THE CHIPPEWA, OTTAWA AND POTAWATOMY TRIBES, *et. al.*,
Petitioners,

vs.

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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COUNTERSTATEMENT OF QUESTION PRESENTED

DID THE MICHIGAN TRIAL AND APPELLATE COURTS COMMIT CLEAR ERROR IN HOLDING, ON THE BASIS OF A FULL FACTUAL RECORD DEVELOPED AT A BENCH TRIAL, THAT ARTICLE XVI OF THE 1817 TREATY OF FORT MEIGS BETWEEN THE UNITED STATES OF AMERICA AND VARIOUS INDIAN TRIBES DID NOT CREATE EITHER AN EXPRESS TRUST OR A CONSTRUCTIVE TRUST IN FAVOR OF PETITIONERS?

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TREATIES

1817 Treaty of Fort Meigs, 7 Stat 160; 2 Kapp 145 ..... Cited repeatedly, beginning at p 1. (Article XVI quoted in its entirety in Petitioners Appendix at p 34a.)

MICHIGAN TERRITORIAL STATUTE

1 Michigan Territory Laws 879, "An Act for the establishment in the City of Detroit, an University, April 30, 1982" .....

CASES

Graver Tank & Mfg. Co. v *Linde Air Products Co*, 336 US 271, 175 (1948) .....

Innis v *Michigan Trust Co*, 238 Mich 282; 213 NW 85 (1927) .....

Rogers et al. v *Lodge et al.*, No. 80-2100., 50 U.S.L.W. 5041, 5044, July 1, 1982; Petition for Rehearing Denied October 4, 1982. .....

Regents v *Board of Education* 4 Mich 213, 229 (1856) .....

Saxon v *Howey*, 247 Mich 508, 512; 226 NW 228 (1929) .....

United States of America v *Johnston* 268 US 220, 227 (1925) .....

COUNTERSTATEMENT OF THE CASE

This case concerns historical events relevant to interpretation of the September 29, 1817 Treaty of Fort Meigs, 7 Stat 160, 2 Kapp 145, between the United States of America and various tribes of Indians, including, but not limited to, the Chippewas, Ottawas, and Potawatomies. In the Michigan courts, Petitioners asserted in the alternative that Article XVI of the Treaty created either an express trust or a constructive trust in their favor, pursuant to which the respondent University became obligated to provide the progeny of the Chippewa, Ottawa and Potawatomy treaty-makers with free education in perpetuity.

Petitioners also asserted that Respondent has been derelict in its duties as "trustee" of the alleged trust by failing to educate Chippewas, Ottawas and Potawatomies. Prior to trial, the court entered an *order in limine*, to which no reference appears in the Petition. The order restricted the issue for trial to whether a trust was created, either express or constructive, and, if so, whether it was abrogated by subsequent treaties (14a).[1] Because it held that the Petitioners had failed to prove either an express or constructive trust, the Trial Court expressly did not reach the issue of abrogation (33a) and entered judgment for Respondent. Thus excluded from proof by the *order in limine* were such matters as how many Chippewas, Ottawas, and Potawatomies have been educated at the respondent University and the amount of financial aid afforded to such students. Notwithstanding the absence of such proofs, the Petition inaccurately asserts at page 12 that:

> "The Indians fulfilled their part of the bargain: the University got the land. The University has not

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[1] Parenthetical references are to Petitioners' Appendix unless otherwise indicated.

> fulfilled its part: the Indian children did not receive the education."[2]

In several other respects, Petitioners' statement of the case fails to present events in sufficient detail to illuminate the issues, contains no indication of which facts were disputed by Respondent and includes several factual assertions which are entirely unsupported by the record. The findings of fact upon which the Trial Judge relied are exhaustively set forth throughout his Opinion. As the Michigan Court of Appeals observed (7a, 8a):

> "To recapitulate each of these findings of fact would be in exercise of expatiation. Rather, in setting forth the findings of fact, we choose to incorporate the entire opinion of the trial court as part of this opinion to accomplish that end."

However, one fact found by the Michigan courts deserves special mention because, without more, it is dispositive of this case. On the basis of the testimony of all three expert witnesses, Petitioners' and Respondent's alike (19a), the Trial Court held that the Treaty provision at issue was not intended by Petitioners' forbears to create a trust; rather, the court (bending over backwards to construe in favor of the Indian Petitioners) nonetheless reached:

> ". . . the conclusion to a reasonable historic certainty that the Indians understood that they were making a gift." (25a)

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[2] Petitioners' *assertion* of this point is explicit in their complaint and implicit in the fact that they filed suit at all, but their Petition suggests that they proved the point, whereas in fact it was not even addressed at the trial.

This conclusion was affirmed by the Michigan Court of Appeals:

> "A third issue raised by Plaintiffs was whether the trial court was justified in holding that Article XVI of the Treaty of Fort Meigs constituted a gift of lands to Father Richard and to defendant. We believe that it did." (9a)

The Trial Court also focused attention upon a curiously contradictory concession made by Petitioners' counsel in his closing argument (R 494, 497). Petitioners' counsel conceded that in Treaty Article XVI the Indian tribes may have made a gift of land at Macon to the church because of their love for Father Richard. But reference to the language of Article XVI (34a) demonstrates that the language used by the tribes made no distinction between the church and the college. In other words, if Article XVI was a gift to the church, it was also a gift to the college. The Trial Court put it this way (21a):

> "It is not disputed that the Indians may have made a gift of land at Macon because of their love for Father Richard. In Article 16, the language used by the Indian tribes made no distinction between the church and the college. This article said that the Indians made a "grant" to the church and the college. This grant was of an undivided one-half of the land at Macon to the church and another undivided one-half to the college. Also grants of undivided fractional interests in the unlocated three sections were made equally to the church and the college. Years later in 1826, the college and the church agreed to swap the undivided interest of the college (now the University of Michigan) in the land at Macon for the undivided interest of the church in the unlocated sections. (Def Ex 24, p 112.) This court can

> reasonably infer from the grant of undivided interests that the Indians made no clear distinction between the church and the college because to them Father Richard was both the church and the college. Throughout this case, the Court has tried to construe the treaty provisions in favor of the Indians, as mandated by *Pillager Bands of Indians, Minnesota* v *United States, supra,* but the above inference is one more example to show that no trust was intended in this case.

The Michigan Court of Appeals accorded the Trial Court's findings of fact the weight they deserve under Michigan law (7a) and the Michigan Supreme Court denied leave to appeal (1a).

SUMMARY OF ARGUMENT

Respondent's primary position is that the uncontroverted facts in this case demonstrate that Petitioners' forbears in 1817 intended nothing more complicated than to reward their long-time friend, Father Richard, by making a gift to two projects to which they knew he was actively dedicated, the Church of St. Anne and the Corporation of the College at Detroit. A gift does not create a trust or impose any duties upon the donee.

Moreover, Article XVI of the 1817 Treaty of Fort Meigs is inadequate to create an express trust binding upon Respondent because, as correctly found by the Michigan courts, Respondent was not a party to the Treaty, the language is precatory and uncertain, and the tribes lacked intent to create a trust.

Nor do the facts attending the 1817 treaty-making require the courts to create a constructive trust in Petitioners' favor. There was no expectation on the part of Petitioners' forbears

of a *quid pro quo* for Article XVI because it was intended as a gift. Further, the Michigan courts found that the intangible right granted by Article XVI was of minimal value and that there was no misconduct on the part of Respondent from which a court might infer that Petitioners had been overreached or that Respondent had been unjustly enriched.

This Petition attempts to cast the United States Supreme Court in the role of a factfinder, a role which the court has historically been reluctant to accept. Moreover, because of its novelty, this case has virtually no precedential value, another reason for denying certiorari.

ARGUMENT

This Petition does not raise a substantive issue of law; it seeks the reversal of the Michigan courts' factual findings that Petitioners' forbears did not intend to create an express trust and that the events of the 1817 treaty-making did not justify the imposition of a constructive trust. The Petition asserts at page 12 that:

> "This Court is in a unique position to do justice by *examining the facts* and doing equity." (Emphasis supplied)

Even without the foregoing express statement, it is evident from the Petition that Petitioners' goal is to have this Court review the trial record and "correct" the Trial Court's and the Appellate Courts' factual conclusions.

But that is not the role of the United States Supreme Court:

> "We do not grant certiorari to review evidence and discuss specific facts." *United States of America* v *Johnston*, 268 US 220, 227 (1925).

Where both the lower court and the appellate court reached the same factual conclusion, this Court has been disinclined to grant certiorari. The U.S. Supreme Court is:

> "... a court of law, ..., rather than a court for correction of errors in fact finding, [and] cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg Co* v *Linde Air Products Co,* 336 US 271, 175 (1948).
>
> "Our recent decision in *Pullman Standard* v *Swint,* _____U.S._____(1982), emphasizes the deference Fed. Rule Civ. Proc. 52 requires reviewing courts to give a trial court's findings of fact. 'Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings . . . .' Slip Op. at 13. The Court held that the issue of whether the differential impact of a seniority system resulted from an intent to discriminate on racial grounds 'is a pure question of fact, subject to Rule 52's clearly erroneous standard.' *Id.,* at 14. *The Swint Court also noted that issues of intent are commonly treated as factual matters. Id.,* at 14-15. We are of the view that the same clearly-erroneous standard applies to the trial court's finding in this case that the at-large system in Burke County is being maintained for discriminatory purposes, as well as to the court's subsidiary findings of fact. The Court of Appeals did not hold any of the District Court's findings of fact to be clearly erroneous, and this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers et al.* v *Lodge et al.,* No. 80-2100., Supreme

> Court of the United States, 50 U.S.L.W. 5041, 5044, July 1, 1982; Petition for Rehearing Denied October 4, 1982. (Emphasis supplied)

The Michigan courts committed no "obvious and exceptional error." Both parties and the Michigan courts agree that Indian treaties are to be liberally construed to ascertain the intent of the Indians, and the lower courts correctly applied this rule (17a, 25a). However, the lower courts concluded that what petitioners' forbears had intended was a gift, not a trust. On the record, the lower courts had no other choice. As the Michigan Court of Appeals observed (10a):

> "The evidence points to an almost reverential attitude toward Father Richard on the Indians' part. This attitude was commingled with an attitude of filial affection. The evidence also points to a clear donative intent on the Indians' part as regards Father Richard and encompasses a similar attitude toward the educational institution which the Indians very properly regarded as an extension of Father Richard's personality and influence."

The Court of Appeals also agreed with the Trial Judge that the respondent was not a party to the Treaty (4a), that the Article XVI language accomplished a complete, unconditional grant (10a)[3], and:

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[3] At page 7 of their Petition, Petitioners repeat, in summary form, a curious argument, considered unpersuasive by the lower courts, to the effect that Richard Peters' use of the word "grant" in annotating Article XVI of the Treaty somehow proves that a trust was intended by Petitioners' forbears. Conceding with Petitioners that Richard Peters "was of renown [sic] stature in the jurisprudence of his time . . .," it seems clear that Peters, working less than thirty years after the Treaty was signed, would know a trust when he saw one, and yet he used the word "grant" in describing the effect of Article XVI. Richard Peters' annotation supports Respondent, not Petitioners.

> ". . . that the plaintiffs substantive arguments in support of the theory of an express trust are based on speculation and irrelevancy."

At page 8, Petitioners cite *Saxon* v *Howey*, 247 Mich 508, 512; 226 NW 228 (1929), stating that a trust can exist without requiring "that all the t's should be crossed and all the i's should be dotted." Immediately thereafter, however (and unmentioned by Petitioners), the same opinion quotes with approval *Innis* v *Michigan Trust Co*, 238 Mich 282; 213 NW 85 (1927), as follows:

> "Although strict in interpreting the statute of frauds to require some writing, the courts are liberal in their construction as to the kind of writing required, and hold that the statute is satisfied by any writing which sufficiently manifests the existence of the trust, *and designates its terms with the certainty which is required in declarations of trusts generally without regard to the statute of frauds.*" (p 512) (Emphasis supplied.)

The Michigan Courts held that the requisite minimal certainty of expression was not present in the case at bar (23a, 24a).

Petitioners also lean upon the language of §8 of the 1821 Act re-establishing the respondent University and transferring property from the 1817 University corporation to the 1821 corporation. (Petition, p. 5.) They think the phrase ". . . subject nevertheless to the uses, trusts and purposes for which the same property was granted, given, conveyed or promised", which appears at the end of §8, modifies the opening phrase dealing with Article XVI of the Fort Meigs Treaty. As the Trial Court correctly observed (27a), this assertion ignores the intervening clause of §8 which is directed to transferring *other* property of the 1817 corporation, including the property described in §7 of the 1821 Act. Section 8 deals with two subjects; one is Article XVI, the other is other property of the

University. The phrase concerning uses, trusts and purposes modifies only the latter. Probably it was included as mere boilerplate anyway, but in no way is it evidence of the express trust in Petitioners' favor for which they contend. In fact, *Regents* v *Board of Education*, 4 Mich 213, 229 (1856), makes it clear that the early Michigan Supreme Court considered the University, not anybody else, the *cestui que trust*, entitled to benefits as successor to the property of the 1817 corporation.

Also pertinent to the issue of whether the facts support the express trust for which Petitioners contend is the following from the Trial Court's opinion (29a, 30a):

> "The university received title to the land in 1824 from the United States, who [sic] was the other party to the treaty of 1817 (Pl Ex D, pp 13, 14). The patent from the United States uses the following language:
>
> 'It is therefore granted by the United States unto the Trustees of the University of Michigan formerly the Corporation of the College of Detroit the Tracts of Land above described: To have and to hold, the said tracts with the appurtenances, unto the said Trustees of the University of Michigan, and to their successors in the Office.'
>
> The patent gave the defendant *unconditional* title the same as the language of Article 16 gave defendant the absolute right to dispose of the land if it wished. The language of these two documents dated within seven years of each other indicates to this Court the absence of any intent to create a trust by either of the parties to the treaty." (Emphasis supplied.)

Finally, with respect to Petitioners' constructive trust claims, the Michigan Court of Appeals cogently observed (11a-13a):

> "The last claim on appeal concerns the issue of a constructive trust. The trial court rejected this theory for several reasons: (1) the university was not a party to the negotiations and committed no misconduct in the treaty negotiations; (2) the Indians were represented by competent interpreters and a trusted Indian agent; (3) the United States evidenced no unjust conduct at the negotiations, its main intent being to secure a cession of a significant area in Ohio; (4) the Article 16 land was of minimal value when conveyed and when the university tried to sell it; . . . Where, as here, the language of the treaty and the historical evidence reflect a gift inter vivos and nothing more, the imposition of a constructive trust is neither equitably nor legally desirable."

These findings were based upon an exhaustive trial record and what the Court of Appeals described as ". . . a meticulously researched and well-drafted written opinion, thoroughly discussing the historical and procedural facets of this novel action . . ." (7a). Under these circumstances, this Court should not conduct a redundant review of the facts or substitute its judgment with respect to such facts for those of the Michigan courts. Especially is this true in a case which lacks precedential value.

CONCLUSION

Respondent prays that the petition for writ of certiorari to the Supreme Court of the State of Michigan be DENIED.

Respectfully submitted,

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